

## **ATTACHMENT A**

## LIST OF COMMENTERS

Ad Hoc Coalition of Telecommunications Manufacturing Companies  
("Ad Hoc Coalition")

Ameritech Operating Companies ("Ameritech")

AT&T Corp. ("AT&T")

Bell Atlantic and NYNEX ("Bell Atlantic/NYNEX")

Bell Communications Research, Inc. ("Bellcore")

Bellsouth Corporation ("Bellsouth")

Competitive Telecommunications Association ("CompTel")

GTE Service Corporation ("GTE")

LCI International Telecom Corp. ("LCI")

Lucent Technologies, Inc. ("Lucent")

Northern Telecom, Inc. ("Nortel")

SBC Communications, Inc., Southwestern Bell Telephone Company,  
Pacific Bell and Nevada Bell ("SBC/PacTel")

Sprint Corporation ("Sprint")

Telecommunications Resellers Association ("TRA")

Public Utility Commission of Texas ("Texas PUC")

## **ATTACHMENT B**

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In the Matter of	)	CC Docket No. 96-98
Petition of MCI for	)	File No. CCB POL 97-4
Declaratory Ruling	)	
	)	
	)	

AFFIDAVIT

**Qualifications**

1. I am an attorney at law, practicing in the City of Los Angeles, California. I have been a member of the Bar of the State of California since January of 1965. At the time of my admission to the California Bar I was on active duty with the United States Army, serving as an air defense artillery officer. My military service continued until October of 1966 when I was honorably released from active duty with the rank of Captain. Prior to reporting for active duty in the Army, I had been employed by the law firm of Irell & Manella. Upon my discharge from active duty I returned to Irell & Manella where I have practiced continuously since October of 1966.

2. I am currently a partner in Irell & Manella LLP. My practice consists primarily in the representation of clients in the computer, telecommunications, multimedia and other advanced technology industries as well as clients purchasing or licensing technology-based products and services. Since approximately the Fall of 1967, I have been actively engaged in the structuring, drafting, negotiation and analysis of a broad range of agreements involving the licensing or transfer of technology and related intellectual property rights.

3. In 1974, I co-authored, with Gerald H. Larsen, a book entitled Data Processing Contracts and the Law, which was published by Little, Brown & Company. This book was primarily devoted to the legal and practical issues posed by various types of contracts for the procurement of data processing equipment, software and services, including the intellectual property issues posed by such agreements. In 1986, I co-authored, with Peter B. Frank and Norman Statland of Price Waterhouse, a two-volume treatise entitled Bernacchi on Computer Law, which was also published by Little, Brown & Company. Once again, the primary focus of the treatise is contracts for the purchase and licensing of technology, including intellectual property issues. This treatise is regularly updated and supplemented.

4. I have also taught courses at the University of Southern California Law Center on several occasions addressing

many of the topics covered in my treatise, including the licensing of intellectual property.

5. I am currently serving as Co-Chairman of Committee R (International Computer and Technology Law) of the International Bar Association's Section on Business Law. Committee R sponsors seminars and sessions at International Bar Association conferences dealing with a variety of issues relating to computer, telecommunications and other advanced technologies, including licensing of intellectual property. I have also served as a member of the Board of Directors and a past President of the United States Computer Law Association and currently serve on its Advisory Board. The Computer Law Association also addresses similar issues in its conferences and seminars. My full curriculum vitae is attached hereto.

#### **Response to Milgrim Affidavit**

6. I have reviewed the Affidavit of Roger M. Milgrim submitted on behalf of SBC/PacTel in these proceedings (the "Milgrim Affidavit"). I am personally acquainted with Mr. Milgrim and respect him as a lawyer and author. As a result, I was quite surprised at what appears to me to be a gross mischaracterization of the impact of intellectual property rights on the matters before the Commission in this proceeding.

7. I don't believe that anyone would dispute the fact that the types of equipment, software, firmware and other elements of the incumbent local exchange carriers' ("ILECs") networks (the "Local Networks") at issue in these proceedings may be, and probably are, the subject of a variety of intellectual property rights and that such rights are often the subject of licensing transactions. However, the extensive description of the types of rights involved and how they apply to various elements of the technology at issue begs the fundamental questions. Even assuming that numerous intellectual property rights are held by various vendors and that such rights are licensed to the ILECs, there is nothing inherent in such intellectual property rights that would prevent the ILECs from providing access to unbundled elements of the Local Networks to competitive carriers ("CCs"). The proper analysis of the issues in these proceedings should focus on the anticipated uses to be made by the CCs of the Local Networks, as mandated by the Telecommunications Act of 1996 (the "Act"), and the extent to which those uses are permitted under the licenses granted to the ILECs.

8. With respect to the first question, it is my understanding from information provided to me by AT&T that the access that is being sought by the CCs is merely access to the physical infrastructure (and associated functionalities) of the Local Networks. This will enable the CCs to provide telecommunications services to end users through the ILECs'

network components as contemplated by the Act. I have been informed that access to the source code of any software (and hence to any of the confidential or proprietary information or technology embodied therein) is not necessary to carry out the purposes of the Act. I am further informed that no "direct" access even to the object code of any software in the Local Networks is necessary. Although the object code will process the traffic transmitted by the CCs (arguably an indirect access), the CCs will not have direct access to the terminals or other equipment that operate the software. Hence, the CCs will not be in a position to obtain or control confidential information or to disclose or compromise the elements of the Local Networks which may be protected by intellectual property rights. Thus, except for the fact that the Local Networks will be carrying traffic for CC customers as well as for ILEC customers, the technical uses made of the licensed technologies and the entities that will have access to any confidential or proprietary information will be no different than those that were undoubtedly contemplated when the licenses were originally granted to the ILECs.

9. Turning to the second question, i.e., are the uses to be made by the CCs of the Local Networks permitted under the existing licenses granted to the ILECs?, it would seem that the answer lies, at least in part, in an analysis of what business activities are contemplated by the license grant in each instance. While I have not had the opportunity to review the specific licenses at issue, it is quite common in such license agreements for the actual license grant to focus on the licensee's "business" or "internal business" or words of similar import. Absent specific limitations in the license agreement prohibiting certain types of activities, the scope of the license grant is commensurate with the licensee's business. Since most businesses evolve and change to some extent over time, the reference to the licensee's business is usually intended to encompass such changes.

10. It is my understanding that the ILECs have historically been engaged in various forms of providing access to the Local Networks and that these activities have been viewed as part of the normal business activities of the ILECs. Since access by the CCs is being mandated by law and is technically very analogous to the access provided to others in the past, it seems unlikely that the mandated access by the CCs would be determined to be outside the scope of the ILECs' business for purposes of the license grants.

11. For the reasons indicated above, it appears that the ILECs' arguments for restricting CC access to network elements based on vendors' intellectual property rights grossly overstates the case for the ILECs with respect to the vendors' intellectual property rights. Nonetheless, without having had the opportunity to review the various licenses involved, it cannot be stated with certainty that the above analysis would

prevail in all instances. Therefore, on the assumption that at least some instances can be cited in which specific provisions in the license agreement prohibit the type of access by the CCs that is mandated by the Act, the issue of which entities should be responsible for obtaining any necessary extensions to the license grant should be addressed.

12. Given the fact that the ILECs have selected the vendors involved in the Local Networks, are familiar with the terms of the license agreements and the intentions of the parties when those agreements were executed, and have continuing relationships with those vendors, the ILECs are the logical entities to seek any necessary modifications to the license grants. It is generally easier for a party to a continuing business relationship to negotiate changes in that relationship than for a third party to do so. Furthermore, to require the CCs, some of whom are relatively small companies with little or no bargaining strength to negotiate under circumstances in which the CCs have no other alternative but to reach agreements with all of the affected vendors if the CCs are to be able to take advantage of the Commission's mandate, increases dramatically the opportunity for the vendors to extract prices that would be highly anti-competitive, thereby defeating one of the principal objectives of the Act.

13. Another concern expressed in the Milgrim Affidavit is the fact that the holders of the intellectual property rights would have no control over the CCs or any ability to enforce their intellectual property rights if the ILECs obtained the necessary extensions, if any, to the license grants to permit the access mandated by the Act. This concern is also unfounded. License agreements often permit sublicensing or access to third parties under circumstances where the third party must agree to abide by certain agreements or provisions of the license agreement in order to be eligible for a sublicense or access to the licensed technology. Furthermore, since the uses contemplated by the CCs in these proceedings do not involve the kinds of "direct" access to the technology or confidential information that most holders of intellectual property rights are concerned with (because such access will continue to be enjoyed exclusively by the ILECs), the likelihood that any of the vendors would ever have a need to enforce its intellectual property rights against one of the CCs is greatly reduced or virtually eliminated.

14. Needless to say, if the ILECs can force the CCs to negotiate with vendors under circumstances in which the CCs have no choice but to make a deal with those vendors, the likely result is a significantly higher cost for obtaining the access that the Act mandates be provided at non-discriminatory cost-based rates. Requiring the CCs to negotiate with the vendors under these circumstances virtually guarantees a

"discriminatory" price because the vendors have no incentive to do anything other than to extract the highest price possible. On the other hand, if further negotiations are necessary and the ILECs conduct those negotiations, the vendors should be interested in preserving their relationships with the ILECs and not adding unreasonable costs to the infrastructure of the ILECs, which will be partly borne by the ILECs. The normal constraints in this type of negotiation will almost certainly produce a lower overall cost for the necessary rights.

I declare under penalty of perjury that the foregoing is true and accurate to the best of my knowledge and belief.

Executed on May 5, 1997

  
Richard L. Bernacchi

SUBSCRIBED AND SWORN TO BEFORE ME this 5<sup>th</sup> day of May, 1997.

  
Notary Public

My Commission Expires:

Sept. 23, 2000





# **RICHARD L. BERNACCHI**

## **PROFESSIONAL EXPERIENCE**

RICHARD L. BERNACCHI is a senior partner in Century City-based Irell & Manella LLP, one of the leading commercial law firms in California. For more than 25 years Mr. Bernacchi has specialized in the legal, technical and strategic planning issues and opportunities and dispute resolutions arising from computer hardware and software, multimedia, telecommunications and other advanced technologies, including development, acquisition, protection and exploitation of intellectual property; licensing, distribution, manufacturing, joint venture and other strategic partnering arrangements; strategic planning and financing; acquisitions and mergers; contracts for the acquisition of information systems and other advanced technology products and services and related contract disputes.

He is the Co-Chairman of Committee R (International Computer and Technology Law) of the International Bar Association's Section on Business Law; member of the Advisory Board, former Director and Past President of the Computer Law Association; co-author of *Data Processing Contracts and the Law* (Little, Brown & Co., 1974); co-author of *Bernacchi on Computer Law* (Little, Brown & Co., 1986), and a frequent lecturer.

## **EDUCATIONAL BACKGROUND**

### **1. Law School - University of Southern California (1961-64)**

Awards: Law Alumni Award (highest academic average in graduating class); Order of the Coif; Phi Delta Phi International Fraternity Graduate of the Year.

Offices Held: Editor-in-Chief, *Southern California Law Review*.

### **2. College - University of Santa Clara**

Degree: B.S.C. (June, 1961)  
(Major: Accounting, Minor: Philosophy)

Awards: Delta Sigma Phi Scholarship Key (Highest scholastic average in School of Business); Quartermaster Association Medal & Scholastic Key; Distinguished Military Graduate.

Honor Fraternities: Alpha Sigma Nu, Beta Gamma Sigma, Scabbard & Blade.

## COMPUTER/INTELLECTUAL PROPERTY LAW EXPERIENCE

### A. Books and Articles

1. Co-author, *Bernacchi on Computer Law: A Guide to The Legal and Management Aspects of Computer Technology* (Little, Brown & Co., 1986).
2. Co-author, *Data Processing Contracts and the Law* (Little, Brown and Co., 1974).
3. Author, Chapter on "Acquiring Software Companies" in *Software Procurement*, Nordic Yearbook of Law and Informatics (1992).
4. Co-author, Chapter on "Distribution of Computer Software in Non-U.S. Countries: Five Important Concerns", *The Law and Business of Computer Software* (D.C. Toedt, ed. 1989)
5. Co-Author, "A Structured Approach to Analyzing the Substantial Similarity of Computer Software in Copyright Infringement Cases", 20 Ariz. State Law Journal 625 (Fall 1988).
6. Co-Author, "Computer System Procurement", 30 *Emory Law Journal* 395 (Spring, 1981).
7. Co-Author, "The Leasing of Hardware" and "Taxation of Computer Hardware and Software", *Computers And The Law*, Third Edition, Section of Science and Technology. American Bar Association (R. Bigelow ed. 1981).
8. Co-author, "Philosophy, Data Processing and the Rules of Evidence", 48 *Los Angeles Bar Bulletin* 374 (August, 1973).

### B. Planning and Advisory Boards

1. Member, Board of Advisors, and Past President of the Computer Law Association.
2. Member, Planning Committee, Computer Law Institute, University of Southern California Law Center (1980- ).
3. Chairman, Awards Committee, World Computer Law Congress (1991-1993).
4. Member, Advisory Board, *Computer Negotiations Report*, published by Sunscope International, Inc., Orlando, Florida.

5. Vice Chairman, Committee R of the Section on Business Law of the International Bar Association.
6. Member, Planning Committee, International Conference on Computers and Law.
7. Member, Advisory Board, Arizona Law and Technology Institute, Arizona State University College of Law (1982-1986).

**C. Lectures and Seminars**

1. Lecturer, Course on Data Processing Contracts in the Advanced Professional Program, University of Southern California Law Center, (Spring, 1972; Fall, 1978; and Fall, 1981).
2. Lecturer, ALI-ABA Course of Study on Law and Computers in the Seventies (1972).
3. Lecturer, American Bar Association, Section of Litigation, National Institute, "The Litigator in a Technological Age" (1975).
4. Lecturer, Computer Law Association, West Coast Conference (1976).
5. Lecturer, Computer Law Association, Annual Meeting Conference (1977).
6. Lecturer, Course on Practical and Legal Aspects of Negotiating Data Processing Contracts, University of Denver (1978).
7. Lecturer, Course on Practical and Legal Aspects of Negotiating Data Processing Contracts, University of Houston (1978).
8. Lecturer, Course on Practical and Legal Aspects of Negotiating Data Processing Contracts, University of Tulsa College of Law (1978).
9. Lecturer, Course on Practical and Legal Aspects of Negotiating Data Processing Contracts, Pacific Lutheran University, Seattle, Washington (1978).
10. Lecturer, Course on Practical and Legal Aspects of Negotiating Data Processing Contracts, University of Toledo (1978).
11. Lecturer, Course on Practical and Legal Aspects of Negotiating Data Processing Contracts, Washington University, St. Louis, Missouri (1978).
12. Lecturer, Course on Practical and Legal Aspects of Negotiating Data Processing Contracts, University of Denver (1978).

13. Lecturer, American Bar Association, Young Lawyers Division, National Institute, "Computers in Litigation" (1979).
14. Lecturer, Computer Law Association, West Coast Conference (1979).
15. Lecturer, Course on Practical and Legal Aspects of Negotiating Data Processing Contracts, American University, Washington, D.C. (1979).
16. Lecturer, Course on Practical and Legal Aspects of Negotiating Data Processing Contracts, Wright State University, Dayton, Ohio (1979).
17. Seminar Leader, "Computer Contracting - A Practical Guide", International Computer Negotiations, Inc. (1979 - 1980).
18. Lecturer, Computer Law Association, Annual Meeting Conference (1980).
19. Lecturer, Practicing Law Institute, West Coast Conference on Computer Law, San Francisco (1981).
20. Lecturer, COMDEX, "Beating the Tax Man Legally" and "Legal Problems of ISO's", 1981 Conference and Exposition, Las Vegas (1981).
21. Lecturer, EDP Auditors Association, Washington (June, 1981) and Los Angeles (1981).
22. Lecturer, "Forming and Financing High Technology Ventures", Third Annual Computer Law Institute, University of Southern California Law Center (1982).
23. Lecturer, Practicing Law Institute, Computer Law, New York (1983).
24. Lecturer, Annual Conference, Arizona Law and Technology Institute (1983).
25. Lecturer, Annual Conference, Arizona Law and Technology Institute (1984).
26. Lecturer, Annual Conference, Arizona Law and Technology Institute (1985).
27. Lecturer, Pacific Rim Symposium, International Bar Association (1985).
28. Lecturer, National Computer Conference, Las Vegas, Nevada (1986).
29. Lecturer, "International Distribution of Computer Software", Seventh Annual Computer Law Institute, University of Southern California Law Center (1986).
30. Lecturer, "Selected Aspects of Negotiating Data Processing Contracts", California County Counsels' Association Conference (1987).

31. Lecturer, "Missed Opportunities and Pitfalls to be Avoided in Structuring End-User and Distribution Contracts", Eighth Annual Computer Law Institute, University of Southern California Law Center (1987).
32. Lecturer, "Potential Points of Conflicts in Advanced Technology Contracts", High Tech and Dispute Resolution Seminar, International Bar Association (1987).
33. Lecturer, "Source Code Escrows and Bankruptcy", London Computer Law Society (1987).
34. Lecturer, "Use of Expert Witnesses in Litigation Involving Computer Contracts", International Conference on Computers and Law (1988).
35. Lecturer, "Keys to Success in Professional Services Projects", 68th ADAPSO Management Conference (1988)
36. Lecturer, "The Impact that Computer Law Will Have on New and Emerging High Technology Applications", Ninth Annual Computer Law Institute, University of Southern California Law Center (1988).
37. Lecturer, "Selected Liability Issues Arising from Electronic Funds Transfers", 3rd National Conference on Computer Law, Buenos Aires, Argentina (1988).
38. Panelist, "Avoiding the Pitfalls in Negotiating Computer System Contracts", 23rd Annual Bank Council Seminar, California Bankers Association, San Diego, California (1990).
39. Moderator, "The Growing Importance of Patent Laws on the Computer Industry", University of Southern California Law Center 11th Annual Computer Law Institute, Los Angeles, California (1990).
40. Lecturer, "Software's Hottest Topics", "Advanced Strategies: Patents and Copyrights", and "Outsourcing Contracts", International Computer Negotiations, Inc.'s Master's Program, Los Angeles, California (1991).
41. Moderator and Lecturer, "Manufacturing and Marketing Opportunities In the United States and Canada", World Computer Law Congress, Los Angeles, California (1991).
42. Lecturer, "Dispute Resolution", Committee R (International Computer and Technology Law Section), International Bar Association Section on Business Law, 10th Biennial Conference, Hong Kong (1991).
43. Lecturer, "Computer Databases: Copyright and Other Protection From the U.S. Perspective", International Conference on Intellectual Property Rights, Chinese National Federation of Industries, Taipei, Taiwan (1991).

44. Lecturer, "U.S.: Development and Marketing of Computer Software - Recent Developments", Fifth International Congress on Computer Law, São Paulo, Brazil (1991).
45. Lecturer, "After The License - Software Maintenance Agreements", Fifteenth Annual Institute, American Intellectual Property Law Association, La Quinta, California (1992).
46. Lecturer, Transactional Session, "Simulated Transactional and Litigation Sessions Covering State of the Art Issues in Computer Law", Computer Law Association, San Francisco, California (1992).
47. Commentator, "Acquiring Software Companies", Software Procurement '92, International Federation of Computer Law Associations, Stockholm, Sweden (1992).
48. Lecturer, "Selling Up, Selling Out", CORUM Conference Series, Los Angeles, California (1992).
49. Lecturer, "Negotiating the Best Deal", Software Asset Management Special Interest Group (SWAMI), Gartner Group, San Jose, California (1992).
50. Moderator, "The Impact of Technology and Law on Strategic Planning for Businesses in the Next Decade", Committee R (International Computer and Technology Law Section), International Bar Association Section on Business Law, Annual Conference, Cannes, France (1992).
51. Moderator and Lecturer, "Intellectual Property Laws: Getting the Competitive Edge", World Computer Law Congress, Second Biennial Conference, San Diego, California (1993).
52. Lecturer, "GOTCHA: Problems, Pitfalls and Strategies for Software Licensing", Software Asset Management Special Interest Group (SWAMI), Gartner Group, Atlanta, Georgia (1993).
53. Lecturer, "Selling Up, Selling Out", CORUM Conference Series, Los Angeles, California (1993).
54. Lecturer, "Extraction and Transplanting of Intellectual Property in a Failed International Venture: A Surgical Response", Fifth Annual International Law Weekend, State Bar of California, San Francisco, California (1993).
55. Moderator, "Leveraging the Emerging Software Pricing Models", Software Asset Management Special Interest Group (SWAMI), Gartner Group, San Francisco, California, New York, New York (1994).

56. Lecturer, "Finance, Distribution and Marketing Aspects of Interactive Media", Division 46 - Media Psychology, American Psychological Association Annual Convention, Los Angeles, California (1994).
57. Lecturer, "Outsourcing, A Growth Industry", National Intellectual Property Law Institute, Washington, D.C. (1994).
58. Lecturer, "Due Diligence in Business Transactions", Irell & Manella Due Diligence Seminar, Beverly Hilton Hotel, Beverly Hills, California (1994).
59. Panelist, Computer Law Association, Information Technology Law '95, Trends & Tips: How the Legal Profession Can Add Value; Contracting Workshop Part I: Tips and Resources, (1995).
60. Moderator, Computer Law Association, '96 Computer & Telecommunication Law Update and World Computer Law Congress; Developments in Anti-Trust and Trade Regulation, Annual Meeting Conference, (1996).
61. Lecturer, "Successful Software Development in New Environments", 17th Annual Computer Law Institute, University of So. California Law Center, (1996).
62. Lecturer, "How to Succeed at Content Acquisition, with a Focus on Online Use", 13th Annual Pacific Rim Computer Law Institute, Washington State Convention & Trade Center, (1996).
63. Panelist, "Protecting your IP Assets in Cyberspace", VentureNet'96, (1996).
64. Lecturer, "The Internet and Electronic Commerce in the United States", The 1997 CLA Pacific Rim Conference, Honolulu, Hawaii (February, 1997).
65. Panelist, "Markets of Tomorrow: Electronic Banking and Commerce", Computer Law Association, 1997 Computer & Telecommunications Law Update, Washington, D.C., ANA Hotel (April 24-25, 1997).

**CERTIFICATE OF SERVICE**

I, Daniel Meron, hereby certify that, on this May 6th, 1997, I served the foregoing Reply Comments of AT&T Corp. by mailing two copies, first-class postage prepaid, to each of the persons on the attached list.

  
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